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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL, AND ABE MCGREGOR GOFF, SOLICITOR, POST OFFICE DEPARTMENT, PETITIONERS

v.

TOURLANES PUBLISHING COMPANY, AND ROY A. OAKLEY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Postmaster General of the United States and the Solicitor of the Post Office Department, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled causes on March 29, 1956.

OPINIONS BELOW

The opinion of the Court of Appeals in the *Tourlanes* case is reported at 231 F. 2d 773, and is reproduced in the Appendix, pp. 24–26, *infra*. The unreported District Court opinion is reproduced in the Appendix, pp. 31–33, *infra*.

The opinion of the Court of Appeals in the *Oakley* case is reported at 231 F. 2d 775, and is reproduced in the Appendix, pp. 27–28, *infra*. The unreported District Court opinion is reproduced in the Appendix, pp. 34–35, *infra*.

JURISDICTION

The judgments of the Court of Appeals were entered on March 29, 1956 (Appendix, pp. 28–30, *infra*). By orders of Justice Black, dated June 22 and July 13, 1956, the time for filing a petition for a writ of certiorari was extended to and including August 25, 1956 (Appendix, pp. 35–37, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the statutory power and duty of the Post Office Department, when it has found that an enterprise is engaged in using the mails for the sale of obscenity, "to return all" mail addressed to such enterprise is limited to mail specifically related to the particular matters found to be obscene.

2. If the power to return mail addressed to vendors of obscenity is thus limited, is a Post Office Department order reaching all mail to be set aside in the absence of any showing by the enterprise of a basis for a possible limitation to mail relating to obscene material and where, absent a showing, such a limited order is impossible of formulation and enforcement?

STATUTE INVOLVED

The Act of August 16, 1950, c. 721, 64 Stat. 451, 39 U. S. C. 259a, provides:

> That, upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—
>
> (a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrived directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and
>
> (b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order

of such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership or association, and the Postmaster General may provide by regulation for the return to the remitters of the same named in such orders or postal notes.

STATEMENT

Respondents brought these actions to enjoin the Postmaster General and the Solicitor of the Post Office Department from enforcing Post Office Department Orders Nos. 55967 and 55986, issued pursuant to administrative determinations, made after hearings, that Tourlanes Publishing Company and the Oakley enterprises were using the mails to obtain money for obscene matter within the meaning of the Act of August 16, 1950, *supra* (which we shall refer to as 39 U. S. C. 259a). The orders direct the appropriate local postmasters to intercept mail addressed to these enterprises, stamp it "Unlawful," and return it to the senders. The orders also forbid the payment of money orders drawn to the order of Tourlanes and the Oakley enterprises and provide that the remitters are to be notified that such payments are forbidden and that the payments would be returned (Tourlanes Joint Appendix, hereinafter referred to as T. J. A., 55–56; Oakley Joint Appendix, hereinafter referred to as O. J. A., 66–67).

As to respondent Tourlanes, an administrative complaint, filed on February 15, 1955, charged a violation of 39 U. S. C. 259a in that respondent's pamphlets contained lewd and obscene photographs of nude

women.[1] Respondent denied the charge, claiming that his pamphlets were devoted to materials of interest to photographers, were free from lascivious or suggestive implications, and were of artistic merit. A hearing was held on March 23, 1955, at which copies of the pamphlets were introduced into evidence. The parties filed proposed findings of fact, conclusions of law, and supporting reasons. On May 23, 1955, the Hearing Examiner rendered his initial decision which, after describing the evidence in detail, concluded that the administrative charge was proved (T. J. A. 49–54). On appeal to the Solicitor of the Post Office Department, this decision was affirmed on August 9, 1955 (T. J. A. 54–55). On the same day, the administrative order was issued.

The administrative proceeding against the Oakley enterprises, the other respondent herein, contained a similar charge of obscenity and, in addition, charged that the Oakley enterprise was being conducted in violation of an affidavit of discontinuance executed by respondent Oakley in 1951, after a prior Post Office Department investigation (O. J. A. 51–52). Specifically, the administrative complaint charged use of the mails for selling obscene and lewd photographs of nude women and for selling lewd books. Respondent Oakley denied the charges generally and placed specific reliance on the contention that it was engaged in the business of selling to students of photography, commercial artists, painters and sculp-

[1] In the *Tourlanes* case, the administrative pleadings and exhibits are contained in the original exhibits filed with the record in this Court.

tors (O. J. A. 55). A hearing was held on April 4 and 5, 1955. After proposed findings and conclusions of law were submitted, the Hearing Examiner rendered his initial decision on June 29, 1955, in which he found the administrative charges to be proved, finding that respondent was indiscriminately selling its material to the public (O. J. A. 57–64). On appeal, the Solicitor of the Post Office Department affirmed this decision on September 15, 1955 (O. J. A. 64–65). The administrative order was issued the same day.

Both respondents filed suit in the United States District Court for the District of Columbia, seeking declaratory and equitable relief (T. J. A. 39–44; O. J. A. 39–50). Essentially, both suits made the same contentions, namely, that the administrative proceeding was not supported by substantial evidence, that the First, Fifth and Eighth Amendments to the Constitution had been violated, and that the businesses involved were dependent upon the use of the mails.[2] Cross-motions for summary judgment were made in each case. The District Court upheld the administrative finding that respondents were purveying obscene material, but determined that they were also selling certain non-obscene matter. For this

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[2] A temporary restraining order was granted to Tourlanes (T. J. A. 44–45) but denied to Oakley (O. J. A. 69). Preliminary injunctions were denied to both respondents (T. J. A. 57–61; O. J. A. 79–83). The District Judges who denied the motions for preliminary injunctions did so on the ground that the Post Office Department order was reasonable and supported by substantial evidence. Appeals taken by respondents from the denials of their motions for preliminary injunctions were subsequently dismissed as moot. App., pp. 26, 28, 29, 30, *infra*.

reason, respondents' motions were granted to the extent that the administrative order was "to be amended to cover only those publications which have been found to be obscene" (T. J. A. 66; O. J. A. 84, 89). As the basis for this directive, the judge stated (App., pp. 32–33, *infra*):

> We are guided by *Summerfield* v. *Sunshine Book Company*, 221 F. 2d 42, 47–48 (D. C. Cir. 1954) cert. den. May 9, 1955, wherein the court declared:
>
> "In consequence, orders of the Postmaster General under Section 259a * * * must be confined to materials already published, and duly found unlawful. Whether such limitation is practically possible * * * is not for this court to determine."
>
> Two publications, "Studio Art" and "Photo and Body" have been declared obscene. Plaintiff has published a tax guide and an affidavit indicates that a further issue is contemplated. Plaintiff has not as yet published a vacation guide, but has expended considerable money in its preparation. Being satisfied that orders issued under 259a must be limited to unlawful activities, future lawful activities, or those not presently held unlawful, cannot be prohibited where one is engaged in both lawful and unlawful activities. Were the rule different, grave constitutional questions would be presented. As Judge Washington noted in the *Sunshine* case, *supra*:
>
> "We do not interpret Section 259a as authorizing orders which raise serious constitutional questions of this sort."

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> The Court is satisfied that there is substantial evidence in the record to support the finding that the publications in question are obscene. Since the Post Office Department's adjudication of obscenity does not appear unlawful, arbitrary, or capricious, we cannot overturn it. At the same time, the order issued by the Postmaster General is too broad and beyond the powers conferred upon him by 39 U. S. C. A. 259a. This is not a case where we can assume that *all* remittances or *all* mail are *prima facie* identified with the illegal business. See and compare *Public Clearing House* v. *Coyne*, 194 U. S. 497, 510 (1904) and *Donaldson* v. *Read Magazine*, 333 U. S. 178 (1948). The order in this case must, therefore, be limited to its proper statutory scope * * *.

In each case, both sides appealed and the appeals were consolidated and considered together. Respondents challenged the refusal of the District Court to set aside the administrative orders in their entirety. The Post Office Department attacked the limitation imposed by the District Judge on the orders.

On March 29, 1956, the Court of Appeals affirmed the District Judge's action in both cases. The District Court's orders were construed as permitting enforcement by the Post Office Department of its orders if "appropriately modified." The court below remarked that the cases were "generally similar" to that considered in *Summerfield* v. *Sunshine Book Co.*, 221 F. 2d 42, certiorari denied, 349 U. S. 921.[3] Taking

[3] The *Sunshine* opinion is set out in the Appendix, pp. 37–55, *infra*.

Tourlanes as typical, the opinion noted that the publications of that respondent included, along with the obscene material, a tax guide "and other innocuous matter." The affirmance of the District Court was then placed squarely on the authority of the *Sunshine* decision. In both cases, counsel for respondents stated before the court below that respondents' appeals would not be pressed if the District Court's order to modify the administrative order was sustained. Upon the strength of these statements, respondents' cross-appeals were dismissed without consideration of their merits.

REASONS FOR GRANTING THE WRIT

The twin decisions below, together with their progenitor of a year-and-a-half ago (*Summerfield* v. *Sunshine Book Co.*, 221 F. 2d 42, certiorari denied, 349 U. S. 921), have so drastically restricted the reach of 39 U. S. C. 259a (*supra*, pp. 3–4) that that statute, designed as a powerful weapon against the trade in obscenity, is bound to have only the puniest of impact in the future. We again present the problem to the Court because it is now indisputable, as it may not have been when we petitioned in *Sunshine*, that without review here this civil obscenity sanction will fast lose all real effectiveness.

1. The effort to obtain quick and easy money by vending lewd and obscene books and pictures is ancient business. Throughout most of the past, the vending has been local in character and, in the main, has consisted of the individual offering and sale of books and specific photographs. During the past few

decades, an important transformation has taken place in this country. Obscene and lewd materials are being sold on a mass basis, mainly by the devices of interstate trucking and by the use of the mails. The articles thus offered for sale are no longer merely individual books, pictures, and post cards, but are frequently periodicals and pamphlets produced on a mass and continuing basis.

Almost as ancient as the business of cultivating a market for obscene materials and pandering to it, are efforts, by community standards and legislative policies embodied in statutes and regulations, to prevent the dissemination and sale of such materials. The enforcement of these standards and statutes has presented at all times a difficult problem, requiring an adjustment between the valid public interest in destroying the business of obscenity and the protection of valid freedom of expression from improper censorship. Given a proper sphere for law enforcement activity—reaching and preventing the dissemination of obscene and lewd materials—it is plain that difficulties of administration have been greatly enhanced by the growth of the business described above. After a recent study, the New York legislature concluded that penal and other sanctions, customary in state legislation, "* * * were inadequate to stem the rising tide of obscene and pornographic publications that have, in recent years, flooded the book and periodical market * * *" (Fuld, J., in *Brown* v. *Kingsley Books,* 1 N. Y. 2d 177, 151 N. Y. S. 2d 639, 642).[4]

[4] This case is now pending before this Court, October Term, 1956, No. 107. Also pending before the Court and related to the

As we have indicated, a principal means making possible the growth of this business of vending obscene materials has been the use of the mails. The "* * * tremendous increase in the volume of obscene materials transmitted through the mails * * *" was one of the reasons assigned by the Postmaster General for seeking the legislation which became 39 U. S. C. 259a. H. Rept. 2335, 81st Cong., 2d Sess., p. 2, and S. Rept. 2179, 81st Cong., 2d Sess., p. 2.[5]

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general problem are *Butler* v. *State of Michigan*, October Term, 1956, No. 16, and *Alberts* v. *State of California*, October Term, 1956, No. 61.

[5] Prior to the enactment of 39 U. S. C. 259a in 1950, Congress had plainly expressed its condemnation of use of the mails for transmission of obscene matter. 18 U. S. C. 1461 provided criminal penalties and further declared obscene matter to be nonmailable. This sanction has proved only partially effective, particularly in the light of present conditions. In the criminal proceedings, the fines are often too small to discourage large-scale operators, and the proceedings themselves necessarily take long periods of time during which obscene mailing continues, a situation which frustrates the basic purpose of preventing the use of the mails for the distribution of such material. Cf. the opinion of Fuld, J., in *Brown* v. *Kingsley Books*, *supra*. The nonmailability sanction is easily avoided by using first class mail which is not subject to inspection by postal authorities (18 U. S. C. 1703; 18 U. S. C. 1717 (c); 39 U. S. C. 259). It should be noted that 39 U. S. C. 259a has not been interpreted by the Post Office Department as permitting the opening of first class mail. The avoidance of inspection by the use of first class mail, too expensive for normal periodicals, is within the reach of obscene pamphlets and periodicals in view of the price charged for each item.

A recent statute subjects those who distribute obscene materials in interstate commerce to a fine of $5,000 or imprisonment of not more than five years or both. Act of June 28, 1955, 69 Stat. 183, 18 U. S. C. 1465. Another recent enactment, Public Law 821, 84th Cong., 2d Sess., approved July 27, 1956, provides a statutory basis for the preliminary impounding of mail pending administrative proceedings under 39 U. S. C. 259a. See App., *infra*, pp 56–58.

39 U. S. C. 259a, *supra*, pp. 3–4, permits the Postmaster General, satisfied by evidence that a vendor of obscenity is obtaining or attempting to obtain money through the mails for his merchandise, to "* * * instruct postmasters * * * to return *all* * * * mail" [emphasis added] addressed to such vendor to the originating post office and thence to the senders, with the word "Unlawful" stamped on the mail matter. Postal money order sums payable to such a vendor would also be returned to the remitters. The statute contemplates an administrative investigation to determine whether a business or course of dealing for the purpose of selling obscenity has been established and, if such a business or course of dealing is shown to exist, an order by the Postmaster General to local postmasters to stop incoming mail to the vendor. On its face, the section envisages inquiries or hearings directed against the going concern; and "all," not merely part of, the incoming mail to that going concern is reached by the statutory language.

Under this view of the statutory purpose and meaning, the orders issued by the Post Office Department in these cases were plainly correct. Tourlanes was entering upon the business of distributing pamphlets, found after hearing to be obscene, through the mails. Similarly, Oakley was found to be repeating, after a prior affidavit of discontinuance, its use of the mails for the dissemination of obscene photographs and pamphlets. The District Court which heard the cases agreed that these administrative findings were supported by substantial

evidence (*supra*, p. 8), and the Court of Appeals did not challenge or overturn them. Both enterprises conduct their business in such fashion that only the interception of *all* incoming mail can operate as a sanction of any sort, since the incoming mail, being first class, cannot be opened by the postal authorities. Nor is either enterprise conducted in such a way that incoming mail can be identified or segregated, even assuming that all of the mail is not attributable to the condemned pamphlets. photographs and periodicals. Hence, the District Court order requiring the Post Office Department to limit its administrative orders to the particular materials found to be obscene is tantamount to a direction that *no* administrative order can be issued since none can be formulated which is restricted solely to the lewd matter. In short, no enforcement is possible even though the administrative findings of statutory violations have been made and found to be supported by substantial evidence.

This crippling result reached in the court below was based on its full acceptance of the principle of the *Sunshine* case (App., pp. 37–55, *infra*). *Sunshine* held, in the case of a periodical, that the Post Office Department's power under 39 U. S. C. 259a to intercept incoming mail was limited to mail allocable to the materials found to be obscene, *i. e.*, the past issues of the magazine. The modification in the administrative order decreed here by the District Court was apparently based on a contention, made for the first time in the District Court, that the enterprises conducted some business other than that involved in the

administrative proceeding.[6] Summary disposition of the cases was made on the basis of general statements to this effect, with the result that no sanction can be levied against the obscene materials because some of the incoming mail *may* relate to a not-yet-published "vacation guide" or a near-useless "tax guide."

It has thus become clear (as we feared at the time of our petition for certiorari in *Sunshine,* Oct. Term, 1954, No. 665, p. 13) that the *Sunshine* principle extends beyond magazines or other regularly published periodicals to all cases in which the vendor of obscenity also purports to sell some nonobscene article or material (such as the "tax guide") or solicits purchases of future "publications" not yet in printed or vendible form. It is already current practice for some dealers in indecent pictures and pamphlets to ask for remittances for periodically-issued series of lewd photographs or films and to include with each shipment a subscription form or order blank for future issues of its pictures. If the decisions below are to become law, it will likewise be easy to nullify the impact of 39 U. S. C. 259a by advertising some innocuous and useless throwaway (in addition to the

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[6] For example, Tourlanes stated that it had in preparation a "vacation manual," not yet published. Further, Tourlanes declared that it had published a "tax guide." There was no showing of the volume, if any, of its business or incoming mail attributable to this tax guide which, upon examination, seems to be a rather poor condensation of the regular instruction booklet furnished to all tax payers by the Internal Revenue Service. Finally, Tourlanes stated that other issues of its pamphlets were of such a nature as to be of more technical interest to students of photography. See T. J. A. 47–49.

real wares) or by including some such harmless "publication" in every shipment of obscene material. Under the *Sunshine-Tourlanes-Oakley* principle, as actually applied in these three cases, such a patent avoidance of the obscenity statutes would procure full immunity from 39 U. S. C. 259a. And since, after these rulings, the District of Columbia is likely to be the forum for most, if not all, future suits to outlaw orders under 39 U. S. C. 259a,[7] that statute will soon become a dead-letter if the error of the court below is not corrected.[8]

2. For these potent practical reasons, we urge again, as we contended in *Sunshine,* that Congress must have intended to empower the Post Office Department to intercept and stop "all" mail, once a finding had been made that the enterprise in question was engaged in substantial use of the mails for the dissemination of obscene and lewd materials. We think the rejection of this plain and necessary reading of 39 U. S. C. 259a stems from constitutional doubts which, on examination, can be dispelled. In our petition in *Sunshine,* October Term, 1954, No. 665, pp. 8–11, we show the virtual identity of the statute here involved

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[7] Inasmuch as the Postmaster General is a proper party to a suit for review of a Post Office Department order, the District Court of the District of Columbia is always an appropriate, and has been the principal, forum for seeking relief from such administrative orders.

[8] The District of Columbia Circuit has recently evinced a restrictive attitude toward other aspects of the regulation of obscenity sent through the mails. See *Sunshine Book Co.* v. *Summerfield,* No. 12622, decided May 31, 1956, reversing 128 F. Supp. 564 (D. C. D. C.), petition for rehearing in banc granted.

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with the long existent statute conveying similar power to the Postmaster General in dealing with fraudulent use of the mails (39 U. S. C. 259, App. pp. 55–56, *infra*); that this identical statute has been held valid against constitutional challenges of the same type which now trouble the court below. *Public Clearing House* v. *Coyne*, 194 U. S. 497, 510; *Donaldson* v. *Read Magazine*, 333 U. S. 178, 189–191. In both these cases, this Court rejected arguments, based on constitutional grounds, which would have had the effect of limiting the statutory powers of the Postmaster General to past conduct and specific materials found to have been fraudulent. *Read Magazine* dealt with the problem of a multiple enterprise, the component parts of which were easily identifiable. In those circumstances, not here present, the Court accepted an order which reached only mail addressed to the fraudulent puzzle department, a relatively minor part of the magazine's business.[9] And the *Coyne* case, cited with approval in *Read Magazine* (333 U. S. at 190–191), squarely rejected an argument that a stop order issued by the Postmaster General must be limited to mail "obviously connected" with the prohibited enterprise. 194 U. S. at 510.[10] If the questions thus resolved by this Court are to be reexamined, we submit that that reexamination should be undertaken here.

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[9] In the *Read Magazine* case, the company expressly urged that the order, if applicable in the future, was a prior restraint. Brief for Respondents in Answer to Questions Propounded by the Court, October Term, 1947, No. 50, p. 50. In sustaining the order against this and similar contentions, this Court said that its "future effect is merely to enjoin the continuation of conduct found fraudulent." 333 U. S. at 191.

[10] "Nor do we think the law unconstitutional, because the Postmaster General may seize and detain all letters, which may in-

3. However, even if we accept the proposition that the Post Office Department's power to intercept incoming mail under 39 U. S. C. 259a is to be limited so as to reach something less than all incoming mail, the proper circumstances to justify such a limitation must exist and the modification in the administrative order should only be made on a full showing by those who, like respondents, object to barring all mail. Cf. *Donaldson* v. *Read Magazine, supra.* In other words, the Post Office Department has at least *prima facie* power to order the interception of *all* incoming mail if the required statutory finding has been made. If an enterprise is legitimately concerned with the receipt of mail relating to lawful activities, the problem should be fairly raised during the administrative hearing on a basis which would enable the Post Office Department to issue a precise order, if justified and made feasible by the cooperation of the enterprise.[11] Again, an objecting party could apply to the Post Office Department for modification of an order, upon

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clude letters of a purely personal or domestic character, and having no connection whatever with the prohibited enterprise. * * * where a person is engaged in an enterprise of this kind, receiving dozens and perhaps hundreds of letters every day containing remittances or correspondence connected with the prohibited business, it is not too much to assume that, *prima facie* at least, all such letters are identified with such business. *A ruling that only such letters as were obviously connected with the enterprise could be detained would amount to practically an annullment of the law, as it would be quite impossible, without opening and inspecting such letters, which is forbidden, to obtain evidence of the real facts.*" [Emphasis added.]

[11] For instance, the enterprise could adopt separate names or addresses for its lawful business, as in the *Read Magazine* case, *supra.*

an appropriate showing and a workable offer permitting separation of legitimate from illegitimate mail. Post Office Department Rules of Practice, 39 CFR (1955 ed.) 201.27. If no such showing is made before the Post Office Department, we may even assume that evidence to the same effect could be adduced in support of a request, in a judicial proceeding, for modification of an administrative order. But cf. *National Broadcasting Company* v. *United States*, 319 U. S. 190, 227.

Wherever it be done, it is our view that the burden is on those who, like respondents, contend for a modified or specific order to provide a feasible grounding for the formulation of such an order. Where, as here, there is no record based on a *bona fide* effort to fashion a proper order, and the respondents simply stand adamant that the purity of their "vacation guide," "tax manual," and "photographic guide" must free even the bulk of the mail with obscenity as its goal, the grant of a so-called modification amounts to a nullification of law enforcement unless the burden of implementing the modification is placed on the respondents. To order the Post Office Department to modify an order at peril, as both courts below have done here, is simply to provide full insulation against any enforcement—solely on the basis of, first, a mere general claim that a legitimate business, real or spurious, is included in the enterprise's affairs, and, second, a refusal to cooperate with the postal authorities in separating the good from the bad.

Within the very recent past, Congress has recognized the tremendous difficulties of effective enforce-

ment of the statute closing the mails to obscene materials, and has provided a new and extraordinary power to be exercised in a fashion which entirely supports our view as to the proper interpretation of the Post Office Department's existing statutory power. H. Rept. 2073, 84th Cong., 2d Sess., pp. 1–3; S. Rept. 2234, 84th Cong., 2d Sess., pp. 2–3. Fly-by-night vendors of obscene materials, through the use of numerous fictitious trade names, have been able to sell their wares, reap an immediate profit through incoming remittances, close, and reappear for a repetition under a different name—all this before an administrative proceeding could properly get under way, let alone reach completion. To reach this situation, pending administrative decision, the Post Office Department sought to erect, by implication from existing laws, a power to impound incoming mail. See the discussion by Justice Douglas in *Stanard* v. *Olesen,* 74 Sup. Ct. 768, 98 L. Ed. 1151. The use of this extraordinary power without supporting statute was felt to be doubtful and legislation was therefore sought and obtained. Impounding can now be ordered by a related administrative and judicial proceeding when the Postmaster General finds such action "necessary to effective enforcement" of 39 U. S. C. 259a. Public Law 821, 84th Cong., 2d Sess., approved July 27, 1956; Appendix, *infra,* pp. 56–58. If a claim is raised that part of the incoming mail is not connected with the suspect activity, a privilege is accorded to receive such mail but only after the mail has been opened and

examined at the post office of delivery and shown to be properly receivable.[12]

Certainly, those who (like respondents) have been found, *after hearing,* to be engaged in using the mails for the vending of obscenity can be given no greater right than this. By statute, "all" of their mail is subject to stop order. See *Public Clearing House* v. *Coyne, supra,* pp. 16–17; *supra,* pp. 12–13. If less than all is to be stopped, the implementing order or decree must recognize and provide a practical basis for a modification which will not, as we have shown, merely provide a total frustration of law enforcement.

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[12] Public Law 821 provides: "When, under any order herein authorized to be issued by the Postmaster General or the district court, a person's mail is detained and held by the postmaster at the office of delivery, such person shall have the right to examine said mail and receive such mail as clearly is not connected with the alleged unlawful activity." The statute derives from H. R. 9842, 84th Cong., 2d Sess. Predecessor bills (S. 8, H. R. 174, and S. 2516, all 84th Cong., 1st Sess.) did not contain the above-quoted provision. Commenting on and approving the need for the extraordinary power conveyed by the proposed legislation, the American Bar Association, by resolution dated October 22, 1955, noted the need for certain safeguards to addressees, one of which was the right to examine and receive legitimate mail. H. Rept. 2073, *supra,* pp. 5, 6. Emphasis was placed on the extraordinary and peremptory nature of the power to be exercised. Absent this specific privilege to examine, the legislation would have justified the impounding of *all* incoming mail. In view of the prevailing circumstances (summarized *supra,* p. 19), examination and receipt of legitimate mail in a fashion which would not interfere with law enforcement was deemed reasonable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
JOSEPH LANGBART,
Attorneys.

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